IN THE

Supreme Court of the United States

No. 70-71

UNITED STATES,
Petitioner,

v.

DENNETH BASS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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OPINIONS BELOW

The opinion of the court of appeals (App. 60-67) is reported at 434 F.2d 1296. The opinion of the district court (App. 55-59) is reported at 308 F. Supp. 1385.

JURISDICTION

The judgment of the court of appeals was entered on November 30, 1970. Mr. Justice Harlan extended the government's time for filing a petition for a writ of certiorari to January 29, 1971. The petition was granted on March

29, 1971. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 18 U.S.C. App. (Supp. V) 1202(a) should be construed to prohibit any possession of a firearm by a felon, without the necessity of proof that the possession was "in commerce or affecting commerce."

2. Whether, if so construed, the statute is constitutional as a valid exercise of Congressional power under the Commerce Clause.

3. Whether the definition of "felony" contained in 18 U.S.C. App. (Supp. V) 1202(c)(2) is violative of due process and equal protection by defining predicate culpability according to State felony-misdemeanor classifications thereby permitting identical prior criminal acts to suffice as predicates in some cases, but not others, depending upon the manner of their classification by the respective States.*

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*As the Solicitor General points out (Pet. br., p. 23, n. 16), the court of appeals found it unnecessary to pass upon respondent's contention that the definition of "felony" in section 1202(c)(2) violated the equal protection clause. Because this Court may, in its discretion, either pass upon the issue or leave it for the consideration of the court below upon remand in the event of a reversal [e.g. *United States v. Spector*, 343 U.S. 169, 172 (1952)], we deem it advisable to brief the question as Point III of this brief.

We also respectfully call the Court's attention to the government's misconception of the argument presented to the court of appeals. The argument presented below was that by making predicate criminal conduct contingent upon state felony-misdemeanor distinctions, two persons committing identical prior criminal acts would be punishable under section 1202 solely on the basis of whether the State of conviction defined the act a felony or misdemeanor punishable by more than two years' imprisonment. No argument was made, as the government believes, that the statute's irrationality stemmed from a distinction between violent and non-violent prior crimes.

STATUTES INVOLVED

18 U.S.C. App. (Supp. V) 1201 provides:

> The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—
>
> (1) a burden on commerce or threat affecting the free flow of commerce,
>
> (2) a threat to the safety of the President of the United States and Vice President of the United States,
>
> (3) an impediment or a threat to the exercise of free speech and the free exercise of religion guaranteed by the first amendment to the Constitution of the United States, and
>
> (4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

18 U.S.C. App. (Supp. V) 1202(a) provides in pertinent part:

> Any person who—
>
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, * * * and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

18 U.S.C. App. (Supp. V) 1202(c) provides in pertinent part:

> As used in this title—
>
> (1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or ter-

ritory or possession and any State or the District of Columbia or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less * * *.

STATEMENT

Respondent accepts the government's statement of the case.

SUMMARY OF ARGUMENT

A.

The language of 18 U.S.C. App. (Supp. V) 1202(a)(1) is ambiguous as to whether Congress intended to dispense with a requirement that receipt or possession of a firearm by a convicted felon be shown in an individual prosecution to have been "in commerce or affecting commerce." In the absence of edifying legislative history, the court of appeals' interpretation that Congress did not so intend is sounder than the broader interpretation urged by the government. Since section 1202(a)(1) specifically provides that transportation of a firearm by a prior felon be "in commerce or affecting commerce," the court of appeals appropriately reasoned that "in commerce or affecting commerce" was also meant to apply to receipt or possession. The government's contrary interpretation necessitates the conclusion that Congress, while prohibiting intrastate receipt and possession, proscribed interstate but not intrastate transportation. Since it is virtually impossible to have an act of transporting, whether intrastate or interstate, without an accompanying receipt or possession, the government's construction

is unsound because, as the government concedes, it requires that the interstate commerce requirement as to transportation be read out of the statute. The court of appeals was on firmer ground, however, in declining to assume, on the meager legislative record before it, that a clause as significant as "in commerce or affecting commerce" could be so cavalierly disposed of, given Congress' traditional reliance on that phrase in other federal criminal statutes.

The court of appeals' narrow interpretation also conforms to the Court's decisions in *United States v. Denmark*, 346 U.S. 441 (1953) and *Rewis v. United States*, 401 U.S. 808 (1971), where the Court also narrowly construed ambiguous criminal statutes enacted under the Commerce Clause. The reasons the Court gave—that the rule of lenity required narrow construction of ambiguous penal statutes, that the consequences of an expansive reading to State-federal relationships and to federal law enforcement resources required a clear expression of Congressional intent and, that determination of the constitutionality of an act of Congress was to be avoided, if possible—all support the disposition below.

B.

Congressional power to regulate local activity under the Commerce Clause is not unlimited. Regulation of simple receipt or possession of a firearm locally by a prior felon exceeds constitutional limitations. Mere receipt or possessions is passive criminal conduct and far removed from any connection with interstate or any other form of commerce. If Congress may regulate such conduct on the rationale that guns are instrumentalities of criminal acts which, though local in nature, affect interstate commerce, then it may also enact a general body of criminal law that would regulate all types of purely local criminal conduct, rendering meaningless the term "Commerce."

Perez v. United States, 402 U.S. 146 (1971), is easily distinguishable because loan-sharking was itself found by Con-

gress to be carried on substantially in interstate and foreign commerce and to contribute heavily to the coffers of organized crime which was interstate and international in character. The local loan-sharking activities involved in *Perez* were subsidiary to the larger class of interstate loan-sharking clearly within Congress' Commerce Clause powers. Moreover, local loan-sharking was itself connected to interstate crime and was commercial by its very nature. Mere receipt or possession of a firearm, however, is not part of a larger class of weapons possession having interstate characteristics nor is it even commercial activity. The government's reliance on statistics tending to show the economic cost of ordinary crime as furnishing a rational basis for Congress' power to prohibit receipt or possession of a weapon is misplaced. Congress has never been accorded the power to regulate purely local criminal conduct, such as robbery, burglary or homicide, a step which it has not taken, and yet one which is at least closer to an effect upon interstate commerce than is the mere anticipatory act of receipt or possession of a firearm.

C.

Section 1202(c)(2) violates due process and equal protection of the laws by defining "felony" as a crime classified under State law as a felony or a misdemeanor punishable by more than two years' imprisonment. As the definition of crimes varies greatly among the States, a person committing the same previous crime as respondent, but in a State which deemed it neither a felony nor a misdemeanor punishable by more than two years imprisonment would not be prosecutable under Title VII. As this permits of an unequal and arbitrary application of the law, it is unconstitutional.

ARGUMENT

POINT I

THE LANGUAGE OF SECTION 1202(a)(1) DOES NOT, WITH REQUISITE CLARITY, ESTABLISH THAT CONGRESS INTENDED TO DISPENSE WITH PROOF IN AN INDIVIDUAL CASE THAT A FELON'S POSSESSION OF A FIREARM WAS "IN COMMERCE OR AFFECTING COMMERCE." SUCH AMBIGUITY REQUIRES A NARROW CONSTRUCTION BECAUSE THE STATUTE IS PENAL IN NATURE AND A BROADER INTERPRETATION ALSO RAISES A SERIOUS DOUBT AS TO ITS CONSTITUTIONALITY.

(a)

There can be little quarrel as to the ambiguity of section 1202(a)(1). The government itself acknowledges that it is not "a model of logic or clarity." (pet. for cert., p. 5). And the divergence of opinion among the various district courts as well as the difference of opinion between the Second Circuit and the four other circuit courts of appeal on the issue is ample evidence of that ambiguity.[1] Even several district courts which have accepted the government's interpretation, have done so haltingly.[2]

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[1] *United States v. Harbin*, 313 F. Supp. 50, 51 (N.D. Ind. 1970) ["The statutory language strikes the Court as neutral. No matter which construction is adopted, the statute reads badly because of the words 'affecting commerce'."]; *Accord, United States v. Phelps*, No. CR-14465 (M.D. Tenn., February 10, 1970); *United States v. Steed*, No. CR 70-57 (W.D. Tenn., May 11, 1970); *United States v. Francis*, No. CR-12,684 (E.D. Tenn., December 18, 1969); *United States v. Bass*, 434 F.2d 1296 (2d Cir. 1970) [this case]. *Contra, United States v. Vicary*, No. CR 44,205 (E.D. Mich., June 29, 1970) (*en banc*); *United States v. Childress*, No. 8039-R (E.D. Va., January 6, 1969); *United States v. Cabbler*, 429 F.2d 577 (4th Cir., 1970); cert. den. 400 U.S. 901; *United States v. Synnes*, 438 F.2d 764 (8th Cir. 1971); *United States v. Daniels*, 431 F.2d 697 (9th Cir., 1970); *Stevens v. United States*, 440 F.2d 145 (6th Cir., 1971).

[2] *United States v. Davis*, 314 F. Supp. 1161, 1166 (N.D. Miss. 1970); *United States v. Wiley*, 309 F. Supp. 141, 142 (N.D. Minn. 1970).

Confronted with the task of construing a statute that had been enacted with little discussion among the members of Congress, and which had been neither the subject of Congressional hearings nor even committee report, the court of appeals placed primary emphasis on the language and internal consistency of the statute itself. As the court's opinion points out, to do otherwise would render meaningless, in several respects, Congress' inclusion of the phrase "in commerce or affecting commerce":

> Interpreting the commerce requirement to modify only the "transports" clause means that, although intrastate receipt and possession are punishable under the statute, intrastate transportation is not. Moreover if both "receipt" and "possession" are punishable without regard to the interstate elements, the modifying clause is meaningless, since there can scarcely be "transportation" whether intrastate or interstate, without an accompanying receipt or possession. Thus, in order to argue that a commerce requirement is not imposed by the statute on "receipt" or "possession," the government is forced to take the position that the commerce requirement of the statute is either totally illogical or mere surplusage. (App. 63).

The government seeks to refute the logic of the court's analysis in several ways.[3] First it is urged that

> an argument can be made that the transportation prohibition of that section includes a prohibition against

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[3]Little need be said about the government's reliance on ordinary rules of statutory construction, such as the "last antecedent" rule which, because of the absence of a comma following the word "transports," the government suggests dictates that only that term is modified by the phrase "in commerce or affecting commerce." Even the district court, which sustained the government's position, cautioned, that "as is often the case * * * there is a contradictory canon in defendant's arsenal. * * * The battle of canons and commas leave us to seek for clues more promising to the legislative meaning." (App. 56). The canon which respondent relied on below, *ejusdem generis*, is equally applicable. See, *Porto Rico Railway, Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920).

> causing a firearm to be transported—an act that can be effected without receiving or possessing the firearm

and thus

> Congress *might have felt* that the broader scope of the term "transports" as compared to the terms "receives" or "possesses" justified its qualification by the interstate commerce requirement. (emphasis ours)
>
> (pet's. br., pp. 14-15)

The government's argument is speculative and casts little light on the problem of construction here presented. For even granting, *arguendo*, the government's premise that Congress meant to include the act of "causing a firearm to be transported," it does not follow that a Congress, intent on outlawing simple intrastate receipt and possession, would have sought to prohibit the "causing" of only interstate transportation of a firearm. Given the four-pronged nature of the findings set forth in section 1201, which the government specifically relies on as evincing an intent to dispense with proof of an interstate commerce element, the act of causing a firearm to be transported intrastate is no less an evil than intrastate receipt or possession.

Recognizing the tenuousness of its argument, the government next asserts that the court of appeals' interpretation "suffered from a more serious defect in that it did not take into account the provisions of Title IV of the very same act of which the present statute was a part" and thus relegated Title IV to "virtual redundancy." (Pet. br., p. 15). Of course, the government concedes that to avoid this "redundancy" this Court would have to read the commerce requirement as to transportation out of the statute. *Id.*, at 17.

Given the last minute nature of Senator Long's amendment, the absence of even minimal Congressional evaluation of it in hearings or committee report (especially with respect to its relationship to other firearm provisions), and the belief by at least one of the few members of Congress who discussed the amendment (Rep. Pollock) that the bill meant to include proof of an interstate commerce nexus

[114 Cong. Rec. 16,298], the court of appeals was correct in deducing that

> [i]t is considerably more probable that the commerce language was inserted to avoid questions of the scope of Congressional power and to mirror the approach to federal criminal jurisdiction reflected in many other federal statutes. (App. 63).

The court's reasoning is firmly based. First, it is significant that several weeks after section 1202(a) was enacted, Congress extensively debated legislation that would have made it a federal offense to commit a crime of violence with a weapon that could be proven to have been in interstate commerce. Thus, even after passage of section 1202(a), Congress was still concerned with the necessity of requiring proof in every case that the instrumentality of the crime had actually moved in interstate commerce.[4]

Secondly, absent proof of an interstate commerce nexus for receipt or possession in each case, section 1202(a) radically intrudes upon traditional state criminal jurisdiction. The court of appeals' interpretation is consistent with the language employed and does not require excision of a term of art—"in commerce or affecting commerce"—of critical significance to our federal system. Thus it respects the sensitive relation between federal and state criminal jurisdiction to which this Court has consistently deferred when not *clearly* instructed by Congress to do otherwise. *Rewis*

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[4]On July 17, 1968, Congress debated H.R. 6137, an amendment proposed by Representative Casey of Texas (but not adopted) to H.R. 17735, subsequently enacted as the Gun Control Act of 1968. That bill provided that a person would be guilty of a federal offense if, during the course of committing any robbery, assault, murder, rape, burglary, kidnaping, or homicide other than involuntary manslaughter, he used or carried any firearm which has been transported in interstate or foreign commerce. 114 Cong. Rec. 21765-21770, 21778-9.

v. United States, 401 U.S. 808 (1971); *United States v. Denmark*, 346 U.S. 441, 447-8 (1953).[5]

In *Rewis*, the Court was presented with a statute which, if broadly construed, would have supported a conviction under Federal law for the operation of a local lottery to which persons sometimes traveled across state lines. The legislative history of that statute was limited and, as here, silent on the implications of rendering traditionally local activity a federal crime. Thus, in language applicable to this case the Court, in addition to expressing its concern with the sensitivity of federal-state relationships, wrote of its awareness of the problem of increased extension of federal enforcement obligations:

> In such a context, Congress would certainly recognize that an expansive Travel Act would alter sensitive federal-state relationships, could overextend limited federal police resources, and might well produce situations in which the geographic origin of customers, a matter of happenstance, would transform relatively minor state offenses into federal felonies. It is not for us to weigh the merits of these factors, but the fact that they are not even discussed in the legislative history of § 1952 strongly suggests that Congress did not intend that the Travel Act should apply to criminal activity solely because that activity is at times patronized by persons from another State. 401 U.S. at 812.

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[5]Indeed, many years ago, Mr. Justice Frankfurter, discussing techniques of construing federal regulatory statutes, especially those enacted under the commerce power, cautioned that

> [t]he task is one of accommodation as between assertions of new federal authority and historic functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 539 (1947).

In the instant case, the broad construction urged by the government renders traditionally local criminal conduct, already prosecutable under the laws of a majority of States,[6] a matter for federal enforcement which, as in *Rewis*, would involve a substantial extension of federal police resources. As the government's petition for a writ of certiorari pointed out, at least 150 prosecutions had already been brought between June 19, 1968, the date of enactment, and January 29, 1971, the date the petition was filed. (pet. for cert, p. 4). Undoubtedly more such prosecutions have since been instituted.[7] Certainly before it sanctions any expansion of the reach of federal police power the Court, as it has previously done, should require a much clearer statement of intent from Congress than is present here.

(b)

In narrowly construing section 1202, the court of appeals did not pause to consider, as have several district courts,[8] yet another rule of construction that supports its judgment: the rule that a penal statute should be narrowly construed, or the rule of lenity.

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[6]See the useful, but not exhaustive survey in Geisel, Roll, and Wettick, *The Effectiveness of State and Local Regulation of Handguns, A Statistical Analysis,* 1969 Duke L.J. 646, 652-655.

[7]When the Casey Amendment (ante, n. 4), which also would have expanded federal jurisdiction over local crimes, was debated, opponents of the bill such as Representative Smith of California, Representative Celler of New York and then Attorney General Clark, expressed concern that the tremendous numbers of local crimes now dealt with under the police powers of the States would require investigation and prosecution by Federal law enforcement officers. 114 Cong. Rec. 21770, 21778-9. Most recently, Attorney General Mitchell warned that broadening federal jurisdiction in general criminal matters could lead to a national police force to which the present administration was opposed for fear of its use as a political weapon. *N.Y. Post,* July 27, 1971, p. 11, col. 1.

[8]*United States v. Harbin, supra,* n. 1, 313 F. Supp. at 51; *United States v. Phelps, supra,* n. 1; *United States v. Steed, supra,* n. 1; *United States v. Francis, supra,* n. 1.

Section 1202(a) is a penal statute. Its ambiguous nature is evident and well documented. See p. 7, *ante*. While the rule of lenity serves only as a means of resolving an ambiguity, not of begetting one,[9] ambiguity in a penal statute to the degree manifested in section 1202(a)(1) has been consistently deemed by the Court to require a construction in the defendant's favor. See, *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221 (1952); *Ladner v. United States*, 358 U.S. 169, 177 (1958); *Heflin v. United States*, 358 U.S. 415 (1959); *Prince v. United States*, 352 U.S. 322 (1957); see also, *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 389 (1959).

Again, the *Rewis* and *Denmark* cases are exceptionally apposite. Both cases involved a question of statutory construction where the government's interpretation would have greatly expanded federal criminal jurisdiction via the Commerce Clause to include conduct not previously within the recognized scope of that clause. In both cases, such interpretation was not an unreasonable one. However, because Congress, in the Court's view, had not clearly resolved to have the respective statutes reach their asserted broad expanse and because the statutes were penal in nature, a narrow reading was required: "our policy in constitutional cases is reinforced by the long tradition and sound reasons which admonish against enlargement of criminal statutes by interpretation." *United States v. Denmark*, *supra*, 346 U.S. at 449. "And even if this lack of support [for a broader reading] were less apparent, ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, *supra*, 401 U.S. at 812.

Lastly, another basic principle of constitutional adjudication adhered to by the court of appeals is that a statute is to be construed in a manner which avoids determination of

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[9] *Callanan v. United States*, 364 U.S. 587, 596 (1961).

a serious constitutional question unless the statutory language leaves no reasonable alternative. *United States v. Denmark, supra,* 346 U.S. at 448-49; *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 348 (1936) (Mr. Justice Brandeis concurring); *United States v. Standard Brewery,* 251 U.S. 210, 220 (1920).

For the reasons already given, we believe the court of appeals' construction of the statute, while not the only possible reading, is the most reasonable one. Only this construction allows pretermission of the serious question of Congress' power under the Commerce Clause to punish simple possession of a firearm without proof of a commerce nexus. We devote Point II of our brief to a discussion of why we believe Congress lacks such plenary power.

POINT II

THE COMMERCE CLAUSE DOES NOT AFFORD CONGRESS AUTHORITY TO PROHIBIT MERE POSSESSION OF A FIREARM BY A PRIOR FELON.

"Scholastic reasoning," the Court has cautioned, "may prove that no activity is isolated within the boundaries of a single state, but that cannot justify absorption of legislative power by the United States over every activity." *Polish National Alliance v. Labor Board,* 322 U.S. 643, 650 (1944). Though vast, Congress' power under the Commerce Clause is not, therefore, unlimited. See also, *United States v. Denmark,* 346 U.S. 441, 462 (1953); Stern, *The Problems of Yesteryear—Commerce and Due Process,* 4 Vand. L. Rev. 446, 463 (1951).

The instant statute constitutes an unprecedented expansion of federal criminal jurisdiction through the guise of the Commerce Clause. If it were sustained, Congress would be deemed possessed of plenary power to enact a general body of criminal law which could encompass every type of ordinary local criminal activity. On the spectrum of criminal conduct, however, simple possession of a firearm is the most passive of criminal acts and entirely remote from a con-

nection with interstate, or even intrastate commerce. If Congress may determine, nonetheless, that possession *simpliciter* constitutes a *per se* burden on interstate commerce because a firearm may be employed in a crime, then Congress would certainly have the power to make any act committed with the weapon, be it robbery, assault or homicide, a federally prosecutable offense. No decision construing the Commerce Clause has ever gone so far. No statute has ever purported to assert such power.

While the purpose of prior Congressional regulation has not always been commercial, it has always been commerce that was regulated. In section 1202, Congress seeks to regulate items which may no longer be and perhaps never were involved in interstate commerce and persons who in no way engage in commercial activity or even activity affecting commerce. Read in conjunction with those powers reserved to the States under the Tenth Amendment, the meaning of the term "Commerce" in Article I, Section 8 of the Constitution becomes senseless if stretched to cover such passive local conduct.[10]

The government's heavy reliance on *Perez v. United States*, 402 U.S. 146 (1971), is not well-founded. *Perez* is a markedly different case in that it involved a "class of activities" —loan-sharking—which Congress, after due deliberation, found was "carried on to a substantial extent in interstate and foreign commerce." 402 U.S. at 147, n. 1. Congress

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[10]Cf. *White v. United States*, 395 F.2d 5 (1st Cir.), cert. den. 393 U.S. 928 (1968), a case heavily relied upon by the government below. The Second Circuit harmonized *White* with this case by noting that the First Circuit, in sustaining Congress' power to regulate possession of depressant and stimulant drugs, "itself recognized the distinct problems inherent in the field of drug regulation," when it wrote:

> 'unlike many other objects of federal regulation, depressant and stimulant drugs are not an inert, passive substance, which after use, pass into the realm of statistics of consumption. They exert an influence on the consumer, which may spell danger or disaster for people or property from or in other states.' 395 F.2d at 7. (App. 66)

also found that extortionate credit transactions constituted a substantial portion of the income of organized crime which itself was interstate and international in character. *Ibid.*

Thus loan-sharking was easily encompassed within traditional Commerce Clause concepts. The means and instrumentalities of interstate commerce were heavily involved and loan-sharking was supportive of a criminal network which itself heavily traversed state boundaries. All that remained for the Court to decide was the legitimacy of Congress' regulation of those extortionate credit transactions which were intrastate and merely ancillary to the larger class of interstate loan-sharking activities. The Court resolved the matter primarily by reference to its prior decisions in which the overriding interstate quality of the bulk of the activities regulated supplied the justification for regulation of secondary intrastate activities. Without such regulation, the otherwise legitimate regulatory scheme would have been thwarted.[11]

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[11] In *United States v. Darby*, 312 U.S. 100 (1941), the Court sustained a statute which excluded from interstate commerce all goods not manufactured under specified labor standards, essentially a valid exercise of Congress' power to prohibit transportation of products across state lines. Moreover, Darby's violation of the provisions of the Act could be punished only if the Government could prove that the employees affected produced goods intended for shipment or actually shipped in interstate commerce.

In *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942), the Court held that Congress could provide for the regulation of milk sold intrastate because it affected the general price structure and thus federal regulation of milk sold interstate.

Similarly, in *Wickard v. Filburn*, 317 U.S. 111 (1942), the Court accepted the government's contention that local wheat consumption affected federal regulation of interstate wheat consumption.

[Footnote continued]

Unlike local loan-sharking, however, mere possession of a firearm, even by a prior felon, is not a class of activities ancillary to a larger class which in turn has an effect upon interstate commerce by virtue of its interstate characteristics. Congress did not find that such possession supported a network of crime carried on across state lines, nor that it was supportive of organized crime which itself had metastasized across state and even national boundaries. Thus, to the extent that the regulation of local loan-sharking in *Perez* was permissible because the far greater portion of loan-sharking was itself interstate in nature, there is no corresponding similarity here.

Had Congress legislated solely against intrastate loan sharking pursuant to its finding that "(e)ven where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce," [402 U.S. at 147, n. 1] approval of that effort would still not validate the instant statute. In sustaining Congress' power to regulate purely intrastate loan sharking activities, the Court in *Perez* still emphasized the link between such activities and interstate and organized crime:

[continued]

In *Katzenbach v. McClung*, 379 U.S. 294 (1964), although the Court noted the effect of exclusion of Negroes from restaurants on interstate commerce, the government still had to prove that the restaurant in question "serves or offers to serve interstate travelers or a substantial portion of the food which it serves * * * has moved in commerce."

In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the government again was required to demonstrate the connection between the defendant's activities and interstate commerce. By the terms of the Fair Labor Standards Act itself, the employers regulated are engaged in commerce or production for commerce and the Court emphasized that the amendment did not change the class of employers affected but merely extended the Act to cover employees originally exempted. 392 U.S. at 193.

Only *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) supports the proposition that purely intrastate activity may be viewed as having an effect on interstate commerce. However, the clear and

> In the setting of the present case, there is a tie-in between local loan sharks and interstate crime.
>
> * * *
>
> . . . loan sharking, in its national setting is one way organized crime holds its guns to the heads of the poor and rich alike and syphons funds from numerous localities to finance its national operations. 402 U.S. at 157.

Moreover, even if one focuses on the nature of loan shark itself without regard to its tie-in to interstate crime, a rational basis for Congress' action can easily be found in the very commercial nature of loan-sharking as a credit extending device with its concomitant coercive impact on legitimate businesses. Indeed, Miranda, the victim in *Perez* was required to close his butcher shop because of his inability to meet the extortionate payments demanded by Perez. See *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

Only the "scholastic reasoning" against which the Court warned in *Polish National Alliance, supra*, 322 U.S. 643, however, can stretch the rational basis test of *Perez* and its predecessors to encompass simple possession of a firearm. The government is forced to the strained position of finding a Congressional basis for regulating mere possession of a firearm in the possibility that the passive state of possession may become a criminal act which in turn will exert an effect upon interstate commerce. Congress has not even attempted, however, to deal with such acts, presumably because they are well within the realm of state criminal jurisdiction. Thus, only the most attenuated reasoning can effect a constitutional connection between possession of a firearm and interstate commerce. Nonetheless, it is this intellectual leap, from possession to effect on interstate commerce that the government proposes as all that is necessary to sustain Congressional power in this case.

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immediate effect upon interstate commerce of the lack of available accommodations to Negro travelers, well documented in the hearings before Congress, would seem self-evident.

Since there were no hearings prior to the enactment of section 1202, the government refers the Court to the fact that Congress, at a time other than when it was contemplating passage of section 1202, had before it facts which showed that the yearly economic cost of homicide is estimated at $750,000,000 and that of robbery, burglary, larceny, and auto theft at $600,000,000. (pet. br., p. 21) The relevance of these statistics, however, is not apparent—unless the Court will underwrite the notion that the economic cost of local crimes alone places them within the commerce power. But this Court has never sanctioned the regulation of ordinary criminal activity such as homicide, robbery or non-interstate auto theft. Indeed, as the defeat of the Casey Amendment (*ante*, n. 4) demonstrates, Congress has declined to regulate this traditional type of local criminal conduct even when committed with a weapon that has moved in interstate commerce. Through section 1202(a)(1), however, Congress has bypassed the intermediate step (outlawing the conduct which creates the alleged impact on commerce) and has proceeded to regulate the anticipatory and therefore much more remote act of possession. To conclude that interstate commerce is affected in this fashion in a meaningful constitutional sense, especially on the most silent of legislative records, is sheer hyperbole. In short, there is no rational basis for Congress' action in this case.

POINT III

THE DEFINITION OF "FELONY" CONTAINED IN 18 U.S.C. APP. (SUPP. V) 1202(c)(2) VIOLATES DUE PROCESS AND EQUAL PROTECTION OF THE LAWS BECAUSE IT DEFINES PREDICATE CULPABILITY ACCORDING TO STATE FELONY-MISDEMEANOR CLASSIFICATIONS AND THUS PERMITS IDENTICAL CRIMINAL ACTS TO SERVE AS A BASIS FOR CONVICTION WHEN DEFINED BY STATE LAW AS FELONIES OR MISDEMEANORS PUNISHABLE BY MORE THAN TWO YEARS' IMPRISONMENT BUT NOT WHEN CLASSIFIED AS LESSER CRIMES IN OTHER STATES.

Respondent could not have been convicted under section 1202(a)(1) unless the government alleged and proved that he had previously been convicted of a "felony." Section 1202(c)(2) defines "felony" as

> . . . any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less.

This classification is violative of the equal protection clause,[12] because it renders subject to conviction a person who possesses a gun and has been convicted of a felony in one state while permitting another person who possesses a gun and who has committed the identical act in another state which classifies that offense as a misdemeanor punishable by no more than two years' imprisonment to be immune from federal prosecution.

In this case, it was stipulated that respondent had previously been convicted in the State of New York of the crime of attempted grand larceny in the second degree (involving the attempted theft of property exceeding the value of

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[12] Applicable to the federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

$1500) a felony under New York law. New York Penal Law, §§ 110.05, 155.35. Throughout the country, however, categories of offenses classified as misdemeanors and felonies vary and an offense which is a felony or serious misdemeanor in one state may be a lesser offense in another. See, President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 30 (1967); *District of Columbia v. Colts,* 282 U.S. 63 (1930). Thus, a person committing the same crime as respondent in California (attempted grand theft), for example, would be guilty of a misdemeanor punishable by less than two years' imprisonment if sentenced to a term in county jail rather than State prison and he would not be prosecutable under Title VII.[13]

There are many other examples of this felony-misdemeanor variance. For example, stealing property valued at $150.00 is a misdemeanor in New York,[14] a felony in Louisiana,[15] a misdemeanor in North Carolina,[16] and a felony in New Mexico.[17] A person convicted of stealing $50.00 in Wyoming, Texas, or Pennsylvania, would be guilty of a felony.[18] However, if $50.00 were stolen in Wisconsin the thief could be convicted of a misdemeanor only.[19] This variance also applies to crimes outside the larceny category. For example, one who is convicted of prostitution for a third time in North Carolina is guilty of a misdemeanor,[20] but a felony if the same offense is committed in Connecticut.[21]

[13]Calif. Pen. Code, §§ 17, 487, 489, 664 (West, 1970).

[14]New York Penal Law, § 155.25.

[15]La. Stat. Ann. R.S. 14:2, 14:67.

[16]N.C. Gen. Stat., § 14-72.

[17]N.M. Stat. § 40A-16-1.

[18]3 Wyo. Stat. Ann.; § 6-132; Texas Pen. Code, Art. 1421; 18 Purdon's Penna. Stat. Ann. § 4807.

[19]Wis. Stat. Ann. § 943.20.

[20]N.C. Gen. Stat. § 14-207.

[21]Conn. Gen. Stat. Ann. §§ 1-1, 53-226.

Section 1202(c)(2) thus possesses a constitutional defect similar to that of the Oklahoma sterilization statute struck down in *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In declaring that the statute's distinction between larcenists and embezzlers for the purpose of sterilization was irrational, the Court condemned the law's laying of an "unequal hand on those who have committed intrinsically the same quality of offense." *Id.* at 541. Yet this is precisely what section 1202(c)(2) authorizes by allowing persons who have committed identical prior criminal acts to be prosecutable under section 1202 only if the State in which that act took place chooses to label it a felony or a misdemeanor punishable by more than two years.

Although Congress undoubtedly faced a problem of draftsmanship in attempting to straddle the differing classifications of crime among the States, it chose a method of definition that fails to avoid great disparity in treatment for the same criminal conduct.

CONCLUSION

For the above reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

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